No. 02-1343

NOV 17 2003

IN THE

Supreme Court of the United States

ENGINE MANUFACTURERS ASSOCIATION AND
WESTERN STATES PETROLEUM ASSOCIATION,
Petitioners,

v.

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF NATURAL GAS VEHICLE COALITION AND CALIFORNIA NATURAL GAS VEHICLE COALITION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF NATURAL GAS VEHICLE COALITION AND CALIFORNIA NATURAL GAS VEHICLE COALITION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTERESTS OF *AMICI CURIAE*

The Natural Gas Vehicle Coalition ("NGVC") and the California Natural Gas Vehicle Coalition ("CNGVC") respectfully submit this joint brief in accordance with Supreme Court Rule 37.3.[1] NGVC, a nonprofit trade organ-

[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the timely filing of all *amici curiae* briefs in this matter. The parties' letters of consent have been lodged with the Clerk of the Court. Pursuant to Rule 37.6 of the Rules of this Court, *amici curiae* state that this brief was not authored in whole or in part by counsel for any party and that no person or entity, other than *amici curiae* and their members, made a monetary contribution to the preparation or submission of this brief.

ization headquartered in Washington, D.C., is a national organization dedicated to the development of a growing, sustainable, and profitable market for vehicles powered by natural gas and hydrogen. NGVC represents more than 180 companies interested in the promotion and use of natural gas and hydrogen as transportation fuels, including: engine, vehicle, and equipment manufacturers; natural gas companies; fleet operators; and service providers. CNGVC, a non-profit trade organization headquartered in Sacramento, California, seeks to promote the continued expansion of the natural gas vehicle market in California, the State that leads the nation in natural gas vehicle usage. The outcome of this action may determine whether the South Coast Air Quality Management District ("SCAQMD" or "South Coast") and other localities and government entities throughout the country may impose reasonable restrictions on commercial and municipal use of fleet vehicles as a critical means to attaining public health air quality standards that also promote the market for cleaner vehicles and fuels.

SUMMARY OF ARGUMENT

For more than thirty years, and through multiple revisions, Congress has established a framework dependent upon dual federal and state regulation under the Clean Air Act to deliver clean and healthy air to the nation. Under this approach, the federal government establishes nationwide public health air quality standards and the States retain the responsibility for devising the strategies to meet these standards in a timely fashion.

Motor vehicle emissions—and particularly heavy-duty diesel emissions—pose significant air quality challenges, especially in the South Coast region. The continued violation of public health air standards in this region has severe public health consequences. Natural gas vehicles are becoming increasingly prevalent because they are far cleaner than their

conventionally fueled counterparts and they are cost-effective. They are an important part of the air quality solution and lend themselves particularly well to being used in centrally fueled fleets.

The South Coast Air Quality Management District's Fleet Rules foster the deployment of this cleaner technology to vehicles used to deliver municipal and commercial services. The rules are reasonable attainment strategies and a vital part of meeting the region's clean air goals.

The plain language of the Clean Air Act's preemption provision, the structure of that statute, Congress' underlying purpose, and the interpretive case law all support a narrow reading of the Section 209 preemption provision. The Act's preemption is limited to motor vehicle exhaust emissions standards. Congress made clear that such standards are different from other, non-preempted, requirements. Congress sought to strike a balance between the need for a national standard, the unique situation in California, and the needs of areas around the nation to come into attainment with public health air quality standards. The limited effect of the preemption provision is consistent with Congress' other objectives of deferring to California's motor vehicle regulation leadership and the retention of state authority and responsibility for delivering clean air. South Coast's Fleet Rules do not impose new exhaust emissions standards upon manufacturers, but are a reasonable attainment strategy for achieving healthy air. They are not preempted by the Act.

ARGUMENT

SECTION 209(A) DOES NOT PREEMPT THE SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT'S FLEET RULES

When Congress legislates in a field traditionally occupied by the States, the Court has consistently "start[ed] with the assumption that the historic police powers of the States were

not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). State law is preempted when Congress intends to "occupy the field" through a pervasive regulatory scheme or when there is an explicit conflict with a federal statute where it is impossible to comply with both the state and federal law. *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 372-73 (2000). And where there is an express preemption provision, no need exists to turn to a theory of implication. *Motor and Equipment Mfrs Ass'n, Inc.* v. *EPA*, 627 F.2d 1095, 1107 (D.C. Cir. 1979) ("MEMA"). The scope of preemption is best assessed "by examining the federal statute as a whole and identifying its purpose and intended effects." *Crosby* v. *National Foreign Trade Council*, 530 U.S. at 373. See also *Egelhoff* v. *Egelhoff ex rel. Breiner*, 532 U.S. 141, 147 (2001); *California Div. of Labor Standards Enforcement* v. *Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 325 (1997).

A. The Clean Air Act Contemplates Dual Federal and State Regulation

For more than thirty years, and through multiple revisions, Congress has established a framework dependent upon dual federal and state regulation under the Clean Air Act. Under this approach, the federal government establishes nationwide public health air quality standards and the States retain the responsibility for devising the strategies to meet these standards in a timely fashion. See, *e.g.*, 42 U.S.C. § 7401(a); 42 U.S.C. § 7410; *Chevron, U.S.A., Inc.* v. *Natural Res. Defense Council, Inc.*, 467 U.S. 837, 845-46 (1984); *Train* v. *Natural Res. Defense Council, Inc.*, 421 U.S. 60, 64-65 (1975).

Except in limited areas, Congress expressly provided that States or their political subdivisions had the right to "adopt or enforce any standard or limitation respecting emissions of air

pollutants or any requirement respecting control or abatement of air pollution." 42 U.S.C. § 7416. Indeed,

> [t]he Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of Section 110(a)(2). . . . Thus, so long as the ultimate effect of a State's choice of emissions limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emissions limitations it deems best suited to its particular situation.

Train, 421 U.S. at 79. Moreover, States may even submit implementation plans more stringent than federal law requires. *Union Elec. Co.* v. *EPA*, 427 U.S. 246, 249-50 (1976).

Thus, the issue in this case must be assessed against the backdrop of a vital role for States in solving the nation's air pollution problem. Moreover, States can face significant sanctions if they fail to attain the national public health air quality standards in a timely fashion. See, *e.g.*, 42 U.S.C. §§ 7410(m), 7509(a)-(b); *Sierra Club* v. *EPA*, 311 F.3d 853 (7th Cir. 2002); *Sierra Club* v. *EPA*, 294 F.3d 155 (D.C. Cir. 2002); *Motor Vehicle Mfrs. Ass'n of U.S., Inc.* v. *New York State Dep't of Envt'l Conservation*, 17 F.3d 521, 527 (2d Cir. 1994) ("MVMA"). Congress has encouraged States to employ a wide variety of inventive methods to meet their obligations under the Act. A State can implement programs for improved public transit, restrict certain roads and lanes for passenger buses or high occupancy vehicles, and create traffic flow improvement programs that achieve emission reductions. 42 U.S.C. § 7408(f)(1)(A). Likewise, States can create economic incentive programs that include "incentives and requirements to reduce vehicle emissions." 42 U.S.C. § 7511a(g)(4).

B. Natural Gas Vehicles Provide Important Clean Air Attainment Benefits for States and Localities to Protect Public Health

1. Diesel Exhaust Air Pollution Poses a Significant Public Health Concern in Southern California

The significant and particular challenge posed by automobile emissions has long been recognized. See, *e.g.*, Edmund S. Muskie, *Role of the Federal Government in Air Pollution Control*, 10 Ariz. L. Rev. 17, 19 (1968) ("automobile exhaust was cited [in the 1963 hearings] as responsible for some 50 percent of the national air pollution problem" (quoting Special Senate Subcomm. on Air and Water Pollution, 88th Cong., 2d Sess., Steps Toward Clean Air 3 (Comm. Print 1964))). The significant health concerns posed by motor vehicle pollution, and particularly diesel exhaust, continue today.

California now has a population of over 34 million people, and as of the year 2000 had 23.4 million registered motor vehicles. California Air Resources Board, *California's Air Quality History Key Events* (2003), *available at* http://www.arb.ca.gov/html/brochure/history.htm. Two hundred eighty billion vehicle miles were traveled in the State that year. *Id.* The South Coast Air Basin is the only area of the country classified by the Environmental Protection Agency ("EPA") as an "extreme nonattainment area". JA 80. In that area, on-road motor vehicles contribute more than half of all hydrocarbons, nitrogen oxides, and carbon monoxide to the emissions inventory. JA 80. In 1998, the year for which SCAQMD had the most recent data when considering the Fleet Rules, the area within SCAQMD's jurisdiction exceeded federal standards for ozone, carbon monoxide or particulate matter on a total of 97 days—far more frequently than in any other area of the United States. JA 244-45. A recent study by the University of California Los Angeles

Institute of the Environment found that air pollution is estimated to cause up to 9,000 premature deaths each year in the Los Angeles basin and that smog continues to worsen. ULCA Institute of the Environment, *Southern California Environmental Report Card 2003* 24 (2003).

Diesel emissions are a particular health concern. EPA has found that:

> [t]he pollution emitted by diesel engines contributes greatly to our nation's continuing air quality problems. Even with more stringent heavy-duty highway engine standards set to take effect in 2004, these engines will continue to emit large amounts of nitrogen oxides and particulate matter, both of which contribute to serious public health problems in the United States. These problems include premature mortality, aggravation of respiratory and cardiovascular disease, aggravation of existing asthma, acute respiratory symptoms, chronic bronchitis, and decreased lung function. Numerous studies also link diesel exhaust to increased incidence of lung cancer. We believe that diesel exhaust is likely to be carcinogenic to humans by inhalation and that this cancer hazard exists for occupational and environmental levels of exposure.

66 Fed. Reg. 5001, 5002 (2001); accord Clean Diesel Independent Review Subcomm. of the Clean Air Act Advisory Committee, *Meeting Technology Challenges for the 2007 Heavy-Duty Highway Diesel Rule* (Oct. 2002), *available at* http://www.epa.gov/air/caaac/diesel/finalcdirpreport103002.pdf; EPA, *Health Assessment Document for Diesel Engine Exhaust*, EPA/600/8-90/057F (May 1, 2002), *available at* http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid =29060; 66 Fed. Reg. at 5022-23 (discussing health studies supporting lung cancer findings). Some of these health effects manifest increased hospital admissions and emergency room visits, school absences, work loss days, and restricted activity days. 66 Fed. Reg. at 5006. EPA's judgment as to the likely

carcinogenic effect of diesel exhaust is shared by the World Health Organization, the National Toxicology Program of the U.S. Department of Health and Human Services, the National Institute of Occupational Safety and Health, and the Office of Environmental Health Hazard Assessment of the California Environmental Protection Agency. 66 Fed. Reg. at 5022-23 nn.41-46.

A comprehensive study conducted by SCAQMD—under the direction of a panel of scientists from universities, an environmental group, businesses and other government agencies—found that over 70 percent of cancer risk in the basin results from diesel particulate emissions. JA 256-57, 271. Asthma effects from diesel particulates are of particular concern because of the increasing prevalence of asthma among children and the frequency of childhood school bus exposures. Children are particularly susceptible to environmental effects because they breathe more per pound of body weight than do adults and they have periods of developmental susceptibility. See Executive Order No. 13045, Protection of Children from Environmental Health Risks and Safety Risks (April 21, 1997). Approximately nine million children in the United States under 18 years of age have been diagnosed with asthma. Centers for Disease Control and Prevention, *Summary Health Statistics for U.S. Children: National Health Interview Survey, 2000* 3, Vital and Health Statistics (Oct. 2003).

As EPA's former Administrator has noted, "[e]very day in America, 24 million children travel safely to and from school on 444,000 school buses – that's four billion miles each year, the equivalent of four round-trip visits to Jupiter. That's a lot of driving and a lot of air pollution." EPA Press Release, *Whitman Announces New Partnership to Reduce Children's Exposure to Emissions from Diesel School Buses* (April 7, 2003), *available at* http://www.epa.gov/newsroom/headline2_040703.htm. Researchers from the University of

California Berkeley School of Public Health found that a child riding inside of a diesel school bus may be exposed to as much as four times the level of toxic diesel exhaust as someone riding in a car ahead of it. Natural Resources Defense Council, *No Breathing in the Aisles: Diesel Exhaust Inside School Buses* 8 (Jan. 2001). These exposures pose as much as 23 to 46 times the cancer risk as risk levels considered significant under the Clean Air Act. *Id.* at 11. The introduction of cleaner buses "will result in substantial health benefits including: fewer cases of lower respiratory symptoms in healthy children; fewer cases of upper respiratory and asthma symptoms in asthmatic children; and fewer cases of acute bronchitis." EPA, *Clean School Bus USA Basic Information*, *available at* http://www.epa.gov/otaq/schoolbus/basicinfo.htm (last modified Oct. 22, 2003).

2. Natural Gas Vehicles Provide a Clean, Cost Effective, and Increasingly Prevalent Low Pollution Alternative

Amici Alliance of Automobile Manufacturers, et. al., ("Alliance Brief") assert without support that the emissions difference between diesel and natural gas vehicles has been "neutralized" and that the Fleet Rules as a result are a "throwback" to an uninformed era. Alliance Br. 3, 10. The data tell a very different story. Natural gas vehicles, such as those encouraged by the Fleet Rules, provide an important strategy for addressing these severe and continuing pollution concerns. Natural gas vehicles can be significantly cleaner on ozone-forming emissions than gasoline vehicles, and even cleaner than those with respect to their diesel counterparts. See, *e.g.*, Dep't of Energy, *Reasons to Buy Alternative Fuel Vehicles*, *at* http://www.ccities.doe.gov/vbg/fleets/about_buying.html (last visited Oct. 21, 2003). Because of the reduced complexity of their emissions control systems due to their inherently clean performance, emissions reductions from natural gas vehicles are more reliable and durable than those

from conventionally-fueled vehicles.[2] Patricia Monahan, *Pollution Report Card: Grading America's School Bus Fleet* 26, Union of Concerned Scientists (2002). They also do not have emissions from the engine itself or during refueling—known as vapor evaporative emissions—which can constitute a significant part of the emissions from gasoline or diesel fueled engines. 59 Fed. Reg. 50,042, 50,070-71 (1994).

A recent study conducted by the University of California at Riverside and Los Angeles found that children riding on diesel buses meeting current requirements had two to five times higher exposures to harmful pollutants than those riding on natural gas buses. California Air Resources Board, *Characterizing The Range Of Children's Pollutant Exposure During School Bus Commutes*, *available at* http://www.arb.ca.gov/research/schoolbus/schoolbus.htm (last visited Oct. 10, 2003). Indeed, the natural gas buses were cleaner than even the best controlled diesels. *Id.* Natural gas school buses emit 90 percent less toxic soot than conventional new diesel-powered buses and are over 98 percent cleaner than older diesel buses. Monahan, *Pollution Report Card: Grading America's School Bus Fleets*, *supra* at x. In considering the Fleet Rules, SCAQMD staff explained that "one diesel refuse truck is estimated to have the same toxicity as up to 74 corresponding natural gas refuse trucks . . . ." JA 130.

While some of these advantages for natural gas vehicles will be lessened when tougher new heavy duty diesel standards promulgated by EPA phase in, these regulations apply only to new engines and it will be many years before the bulk of the diesel vehicles on the road turns over to these cleaner vehicles. 66 Fed. Reg. at 5012. Fleets will not fully comply with that rule until the year 2030. *Id.* at 5014.

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[2] One of California's clean car standards, the AT-PZEV standard, requires manufacturers to certify the emissions durability for 15 years or 150,000 miles. Cal. Code Regs. tit. 13, § 1962(c)(2)(A), (C)-(D) (2003).

Moreover, diesel engine manufacturers, including petitioner EMA's members, have repeatedly raised doubts about their ability to conform with the significantly cleaner standards that will take effect for vehicles manufactured in 2007 and after. See, *e.g.*, *National Petrochemical & Refiners Ass'n* v. *EPA*, 287 F.3d 1130, 1136-1138 (D.C. Cir. 2002); Brief of Petitioner Cummins Inc. at 4, *National Petrochemical & Refineries Ass'n*, 287 F.3d 1130 (D.C. Cir. 2002) (No. 01-1052) ("Technology does not exist today to meet the standards for heavy-duty diesel engines. Moreover, EPA has not identified any path toward development of such technology by 2007. . . .").

Alternative fueled vehicles are becoming increasingly prevalent because they are both a sound environmental and a cost effective choice. While diesel engine manufacturers struggle to meet the upcoming new emissions standards, recent government testing has also shown that some natural gas heavy-duty engines are already twice as clean as the 2007 EPA standards—and cleaner than any diesel engine available today. Dep't of Energy, *The Next Generation Natural Gas Vehicle Activity*, DOE/GO-102003-1779 (Sept. 2003). One natural gas vehicle manufacturer recently completed a purchase contract with the Metropolitan Transit Authority of Los Angeles County to supply between 200 and 600 buses with an engine targeted to achieve 40 percent lower nitrogen oxide emissions than the best equivalent low-emissions diesel engines certified to date. Press Release, Cummins Westport Inc., New Cummins Westport Engine Selected by Los Angeles for up to 600 Buses (July 18, 2003), *available at* http://www.cumminswestport.com/press/index.php. This engine is also expected to be certified for particulate matter at a level that is 80 percent lower than those set by EPA for regulations for transit buses. *Id.* Indeed, the cleanest internal combustion engine light-duty vehicle commercially available at the time of the consideration of the Fleet Rules was a

compressed natural gas powered Honda Civic, which is on average 90 percent cleaner than the average new 2000 model year vehicle. JA 86-87.

The Fleet Rules are readily achievable. There are almost 130,000 natural gas vehicles on the nation's roads today. Leslie Eudy, *Natural Gas in Transit Fleets: A Review of the Transit Experience* 2, National Renewable Energy Laboratory (Feb. 2002). There are 5,000 natural gas transit buses—almost ten percent of the total—currently on the road. American Public Transportation Ass'n, *2001 Transit Vehicle Book* 368, 638 (June 2001). Approximately 22 percent of all new transit bus orders are for natural gas. Eudy, *Natural Gas in Transit Fleets*, *supra*, at 2. School districts in at least 19 states currently use natural gas buses. Monahan, *supra*, at x; NRDC, *No Breathing in the Aisles*, *supra*, at 24. Natural gas transit buses are used in cities from New York to Los Angeles. Monahan, *supra*, at 29. Natural gas vehicles also can be approximately 25 per cent or more cost effective than gasoline or diesel vehicles.[3] Leslie Eudy, *SuperShuttle CNG Fleet Evaluation*, National Renewable Energy Laboratory 13 (Oct. 2000); Monahan, *supra*, at x, 29 (citing Sacramento Regional Transit District and SunLine Transit Agency, *Three Year Comparison of Natural Gas and Diesel Transit Buses* (1999)).

The Court has recognized the significant role that "technology forcing" can play in encouraging the development of new and cost-effective approaches to meeting

[3] Any past concern about the availability of a compressed natural gas fuel infrastructure in Southern California is now misplaced. In testimony before the California Public Utilities Commission, Southern California Gas Company noted that in 2001 there were 160 fueling stations in that region. Prepared Testimony of Michael L. Eaves, Application No. 02-03-047, 2002 LEV Proceeding (March 25, 2002) at 26, 33.

pollution challenges. Justice Breyer reviewed the history of these efforts and found that:

> [t]hose persons, for example, who opposed the 1970 Act's insistence on a 90% reduction in auto emission pollutants, on the ground of excessive cost, saw the development of catalytic converter technology that helped achieve substantial reductions without the economic catastrophe that some had feared.

Whitman v. *American Trucking Ass'ns, Inc.*, 531 U.S. 457, 492 (2001) (Breyer, J., concurring).

Congress has also long recognized that, for several reasons, fleets can be particularly cost-effective places to achieve emissions reductions and pioneer new technologies:

> fleets represent a logical spot to introduce clean-fuel vehicles. Fleet operators have central refueling facilities that should simplify the transition to new fuels. They can provide regular professional maintenance for early models. And per vehicle, they drive twice as many miles as vehicles used by the general public. This affords fleet vehicles the best opportunity to take advantage of the fuel savings that certain alternative fuels (particularly natural gas and electricity) may provide.

Henry A. Waxman, et. al., *A Review of Major Provisions: Cars, Fuels and Clean Air: A Review of Title II of the Clean Air Act Amendments of 1990*, 21 Envtl L. 1947, 2002 (1991) (citing Office of Technology Assessment, *Catching Our Breath: Next Steps for Reducing Urban Ozone* 188 (1989)).

Significant incentives for developing alternative fleets have been created by the federal government. These incentives have occurred with, at a minimum, the acquiescence of Congressional appropriators. The Federal Aviation Administration, for instance, has established a $17.3 million grant program pursuant to the Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 47136, to encourage the use

of alternative fuel vehicles in fleets operating at airports, and the Secretary of Transportation provides regular reports to Congress on this program. See Dep't of Transportation, *Report to Congress: Inherently Low-Emission Airport Vehicle Pilot Program* (Nov. 2001), *available at* http://www2.faa.gov/arp/app600/ileav/RTCaq.htm; *FAA Selects 10 Airports for $17.3 Million in Grants for AFVs* 5-6, New Fuels & Vehicles Report (June 7, 2001).

Airport use of alternative fueled vehicles provides a particular demonstration of their benefits. Many airports operate in areas not meeting public health air quality standards, and airports frequently have huge motor vehicle emissions inventories. Los Angeles International Airport, for instance, is the second largest industrial smog source in the Los Angeles Area. Coalition for Clean Air, *Fast Facts* 3, *available at* http://www.coalitionforcleanair.org/cca/facts.htm (last visited Nov. 6, 2003). Airport motor vehicle fleets today can have even more intensive use than Congress recognized in 1990, amounting to ten to twenty times the fuel use of private vehicles. A typical airport shuttle bus travels approximately 60,000 miles per year. Clean Vehicle Education Foundation, *AFVs in the Airport Shuttle Industry: Characterization of a Niche Market* 17, *available at* http://www.ccities.doe.gov/toolkit/pdfs/section3_market.pdf (last visited Nov. 13, 2003).

Dallas/Fort Worth has a draft policy that would require all commercial ground transportation vehicles to consist of 100% Ultra Low Emissions Vehicle certified vehicles or the equivalent by 2007. Dallas/Fort Worth International Airport, *Draft Commercial Ground Transportation Transition Plan to Clean Vehicle Fleets* (Dec. 13, 2002). All taxicabs, luxury sedans, shared ride/shuttles, hotel shuttles, off-airport parking shuttles, and other courtesy vehicles that are added to a company's fleet operating at the Dallas/Fort Worth Airport must be at a minimum LEV or the equivalent after 30 days of the plan's adoption. *Id.* Municipalities likewise have chosen

to contract for services with fleets that have made the commitment to transition to lesser-polluting alternative fuel vehicles. See, *e.g.*, City of Palm Desert Exclusive Franchise Contract to Perform Solid Waste Collection and Recycling Services (July 1, 1995)("CONTRACTOR agrees that a minimum of 50% of new engines for its entire fleet will be alternative fuel vehicles."); Franchise Agreement Between the City of Alameda and Alameda County Industries AR, Inc. for Solid Waste, Recyclable Materials and Organic Materials Services (July 3, 2002)("On the Commencement Date of this Agreement, at a minimum, fifty percent (50%) of the Solid Waste Collection vehicles and fifty percent (50%) of the Recyclable Materials and Organic Materials Collection vehicles used regularly on Collection routes by Contractor shall be Clean Alternative Fuel Vehicles."). For many States and localities, finding these cost-effective fleet-based reductions is an enormously beneficial attainment strategy and—for some regions—a vital part of their pathway towards compliance with the Act's requirements.

C. The SCAQMD Fleet Rules Are Not A Pre-empted "Standard" Under Section 209(a)

1. The Plain Language of the Clean Air Act Shows that Congress Limited Preemption to the Precise and Narrow Concept of "Standards" Rather than to Any Action Affecting Emissions

Within the context of state obligations to meet the national public health air quality standards under the Act, Congress assigned the duty to the federal government to set national motor vehicle emissions standards, 42 U.S.C. § 7521, but it also reserved for California the ability to develop such standards and allowed other states to follow California's lead. 42 U.S.C. § 7543. Congress was precise in the language that it used to limit state actions in this regard. Except for

vehicles regulated under the California scheme, the Clean Air Act provides, "[n]o State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part." 42 U.S.C. § 7543(a) (emphasis added). Section 209(b) allows California to receive a waiver from EPA to issue standards to control emissions from new motor vehicles provided that the standards are at least as protective, in the aggregate, as the Federal standards. 42 U.S.C. § 7543(b). Any State may then adopt standards that are identical to California's more stringent standards controlling emissions. 42 U.S.C. § 7507.

When arrayed against the carefully crafted limitations on fleet use adopted by South Coast, it is plain that the preemption language of the statute itself is inapplicable. The Fleet Rules only require public agencies, those contracting to provide services on behalf of public agencies, or specific types of licensed private fleets to select among certain lower-emitting vehicles already certified as meeting emissions standards by the California Air Resources Board ("CARB"). See, *e.g.*, JA 27.

Congress limited its preemption in Section 209 to the narrow phrase "standard relating to the control of emissions." Despite the efforts of the petitioners and their *amici* to reach the circumstances here by conflating anything resulting in the control of emissions with the much more particular concept of a "standard", see Pet Br. 25; Alliance Br. 7, the text of the Clean Air Act does not bear them out. Surely the Act would not, for example, go so far as to prevent local transportation agencies from choosing to purchase natural gas transit buses themselves or from deciding upon purchasing smaller, less expensive, and more fuel-efficient vehicles that happen to have lower emissions as well.

The second sentence of Section 209(a) prohibits States from creating conditions precedent to the initial retail sale,

titling, or registration of a new motor vehicle. 42 U.S.C. § 7543(a). The Fleet Rules, however, only require fleet owners to purchase vehicles that are either (1) classified under CARB's regulations as "low emission" vehicles or (2) operate on an alternative fuel. See, *e.g.*, Rule 1191(e) (JA 28). They are "expressly designed to work in tandem with CARB's certification process." JA 219. Therefore, the Fleet Rules do not prevent manufacturers from selling non-low emission vehicles, nor do the Rules require that the manufacturer sell a specified percentage.[4] Rather they require a special class of purchasers to buy vehicles that are already in the market.[5]

Petitioners and *amici* concede that certain "in-use" motor vehicle controls, such as carpool lanes and idling restrictions, are not preempted under the Act. Pet. Br. 5; Alliance Br. 11. But other controls adopted by States and local governments are far more subtle, such as those that provide special clean fuel licenses for use of carpool lanes by alternative fueled vehicles, Va. Code. Ann. § 33.1-46.2 (Michie Supp. 2003), or even the creation of tax incentives or subsidies to encourage the purchase of this type of vehicle. Twenty-nine States have adopted tax and other incentive programs that are designed to create the preference for the purchase of alternative-fueled

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[4] Each Fleet Rule also contains an exception that allows fleet operators to purchase "higher emission" vehicles in the event that no certified alternative fuel vehicle exists. See, *e.g.*, Rule 1191(g) (JA 30).

[5] Nor do the Fleet Rules single out diesel-fueled vehicles because of antipathy toward this particular technology. In passing these provisions, SCAQMD's Governing Board resolved that its staff should "continue to evaluate all engine technologies including conventional diesel . . . and make recommendations for the potential inclusion of these technologies" in the Fleet Rules. SCAQMD Resolution No. 00-XX at 5. Staff are required by this Resolution to return to the Governing Board with proposed amendments in the event that conventionally fueled vehicle engines achieve particular CARB-certified emissions and toxics reductions targets. *Id.* at 7.

vehicles, such as natural gas cars and trucks. See Clean Cities Program, *Department of Energy Compilation, at* http://www.ccities.doe.gov/vbg/progs/laws.cgi (last visited Nov. 6, 2003). Incentives exist in various forms from coast to coast. California has adopted the Carl Moyer Air Quality Standards Attainment Program, which provides funds for the purchase of vehicles that achieve a 30 percent reduction of nitrogen oxide emissions compared to current emissions standards. California Environmental Protection Agency, *The Carl Moyer Memorial Air Quality Standards Attainment Program Guidelines* (2003), *available at* http://www.arb.ca.gov/msprog/moyer/2003moyerguide.pdf. Licenses given by the City of Dallas permit alternative fuel taxicabs and shuttles to be up to seven years old, whereas conventionally fueled vehicles may only be up to five years old. Dallas City Code § 44-7.2.1(a). Washington, D.C. will only contract for school bus transportation services with companies whose fleets have more recent, and therefore lesser polluting, models. Monahan, *supra*, at 17. Petitioners and their *amici's* suggestion that Section 209(a) creates a clear dividing line between a federal sphere pertaining to any and all actions affecting motor vehicles before their initial sale and a limited state sphere of permissible regulation after sale makes no sense in view of these kinds of state and local actions, which are intended to have the effect of reducing emissions, but are not themselves emission standards.

The Section 209 preemption provision is tethered to the substantive content of the authorization for federal motor vehicle emissions standard setting in Section 202. That entire provision is written in terms of narrow numerical standards for motor vehicles. 42 U.S.C. § 7521. Throughout Section 202, Congress uses "standards" to refer to quantitative limits, see 42 U.S.C. § 7521(3)(A), and Section 202(g) requires that regulations contain "standards which provide that such

emissions from a percentage of each manufacturer's sales volume of such vehicles" must not exceed specified levels. 42 U.S.C. § 7521(g).[6]

The text of the Act is plain that the preemption provision is narrowly circumscribed. Congress clarified that, "[n]othing in this part shall preclude or deny to any State or political subdivision thereof the right otherwise to control, regulate, or restrict the *use, operation, or movement* of registered or licensed motor vehicles." 42 U.S.C. § 7543(d)(emphasis added). Nor did Congress limit this clarification to those actions "not affecting emissions," something it plainly could have done. South Coast's Fleet Rules fall within this authorization to regulate use, operation, or movement. Since the Fleet Rules are restrictions on use that apply to commercial or public fleet operators and not directly to the manufacturers, they fall within this protected area of state and local authority.

This limiting construction of Section 209(a) is not changed by Congress' choice in that subsection of the phrase "relating to" the control of emissions. As this Court stated in *Egelhoff*, that while "relating to" indicates that the subject is broadly construed, there is an outer limit—the term cannot be construed to make "preemption turn on infinite connections." 532 U.S. at 147. Similarly, Justice Scalia, joined by Justice Ginsburg, recognized in a concurrence that the phrase is of little moment to preemption analysis because "everything is

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[6] EPA has recently declined to regulate carbon dioxide motor vehicle emissions under section 202, finding in part that it lacks statutory authority to engage in such regulation. 68 Fed. Reg. 62,922 (2003). Since federal authority to grant a motor vehicle emissions waiver to States is premised upon the scope of that authority, and preemption is intended to be "coextensive" with this waiver authority, *MEMA*, 627 F.2d at 1107, preemption arguably would not apply were SCAQMD to have based its regulation on addressing global warming concerns stemming from carbon dioxide emissions.

related to everything else." *Dillingham Constr., N.A., Inc.*, 519 U.S. at 336 (1997) (Scalia, J. concurring); accord *N.Y. State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Inc.*, 514 U.S. 645, 655-56 (1995). Here, it is plain that Congress in its preemption language was addressing narrow vehicle emissions controls rather than any strategy employed by a State which might result in reduced motor vehicle emissions overall.

Moreover, Congress consistently distinguished between this narrow concept of "standards" and other types of requirements, such as "accompanying enforcement procedures," throughout each of the provisions in Section 209. See *City of Chicago* v. *Environmental Defense Fund*, 511 U.S. 328, 338 (1994) (citing *Keene Corp.* v. *United States*, 508 U.S. 200, 208 (1993)) ("It is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute and omits it in another."); see also *Bailey* v. *United States*, 516 U.S. 137, 146 (1995)("a legislature is presumed to have used no superfluous words"). Sections 209(a), 209(b)(1)(C), and 209 (e)(2)(B) each differentiate between the phrase "standards" and other types of requirements. 42 U.S.C. §§ 7543(a), 7543(b)(1)(C), and 7543(e)(2)(B). Congress must have intended for the specific term "standard" to refer to a specific type of quantitative requirement respecting emissions with a direct impact on air quality, rather than to a broad, all encompassing term.

The Circuit Courts have consistently adopted this reading of the Act, emphasizing the specificity of the terminology employed by Congress. As the U.S. Court of Appeals for the District of Columbia Circuit has explained:

> [t]hese references [in subsection (a)] to efforts at enforcement would have been unnecessary if Congress intended that "standards" meant any regulation relating to motor vehicle emissions control. . . . Congress intended the word "standards" to mean quantitative levels of emissions rather than regulations involving certification or in-use maintenance restrictions. . . . . The Senate Report on the Air Quality Act of 1967, discussing the preemption provision, mentions "standards" for hydrocarbons, nitrogen oxides, and carbon monoxide in obvious reference to the numerical limitations on those pollutants.

MEMA, 627 F.2d 1107, 1112 (D.C. Cir. 1979) (citing S. Rep. No. 90-403, at 32 (1967)); accord *Motor Vehicle Mfrs. Ass'n of U.S., Inc.* v. *DEC*, 79 F.3d 1298, 1305-06 (2d Cir. 1996)(finding no identicality requirement to avoid preemption for mechanisms employed to enforce state adopted standards). See also EPA Opinion on Issues Raised by *Am. Auto. Mfrs. Ass'n* v. *Mass. Dep't of Envtl. Protection*, 163 F.3d 74 (1st Cir. 1998) (Sept. 15, 1999) at n.11 (noting narrow breadth of term "standard" in sections 209 and 177 in contrast to enforcement language, while finding requirements as to numbers of vehicles meeting certain quantitative emissions levels are within the ambit of "standard" under the Act).[7]

2. The Text and Structure of Other Clean Air Act Provisions Support Affirming the Lower Courts' Opinions

Other provisions of the statute bear out the limited nature of its preemption. Section 116, which retains state authority other than as limited in Section 209, refers to a much broader set of circumstances than just "standards relating to the control of emissions." It refers to "standards or limitations"

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[7] EPA's Opinion Letter finds that "production requirements" as to the number of vehicles meeting a certain emissions level are within the scope of "emissions standards" under sections 209 and 177 because, among other reasons, an indication of market penetration is central to evaluating feasibility and cost issues under Section 202. These issues are not implicated by the Fleet Rules here, which merely require the selection among already certified models.

as well as to "*any requirement* respecting control or abatement of air pollution." 42 U.S.C. § 7416 (emphasis added). Congress is presumed to intend the use of such starkly different language and could have been so expansive had it intended the preemption provision to have such a broad sweep. See *City of Chicago*, 511 U.S. at 338.[8]

These careful distinctions are preserved throughout the Act. Section 242, which sets forth certain requirements for the clean fuel vehicle program, could not be clearer in distinguishing between "standards"—referring to numerical emissions from motor vehicle exhaust—and "other requirements." Compare 42 U.S.C. § 7582(a) and 42 U.S.C. § 7582(b).

In its regulations setting forth the requirements to implement the Clean Fuel Fleet Program ("CFFP") provisions of Section 246, 42 U.S.C. § 7586, EPA went to great pains to distinguish between production requirements and fleet-based incentives, similar to those at issue here. EPA explained:

> [t]he legislative history of the 1990 amendments to the [Clean Air Act] indicates that, in adopting the [Clean Fuel Fleet Program], Congress made a clear choice between two alternatives: requiring auto manufacturers to produce and sell [Clean Fuel Vehicles], or creating a market for [Clean Fuel Vehicles] and for clean alternative fuels by requiring fleet operators to purchase

[8] Congress included in the Act a variety of other arguably relevant provisions designed to increase the types of tools available for States and industry to achieve cleaner air. See 42 U.S.C. § 7511a(c)(4)-(5) (authorizing States to impose transportation control measures to reduce motor vehicle emissions); 42 U.S.C. § 7586 (authorizing state limitations on certain fleet operators as part of a Clean Fuel Fleet Program). The Clean Fuel Fleet Program provisions of Section 246 are merely a pilot designed to foster and test these approaches.

> such vehicles and operate on such fuels. [Congress] chos[e] the latter option . . . .

63 Fed. Reg. 20,103, 20,104 n.4, 20,105 (1998) (citing *A Legislative History of the Clean Air Act Amendments of 1990*, vol. 1 at 903). The United States, as *amicus*, confuses these issues by attempting to read this history as a prohibition on the Fleet Rules, rather than as a long-standing Congressional acknowledgement of the appropriateness and limited purpose of approaches of this nature.[9] U.S. Br. 20.

Petitioners incorrectly state that Section 246, the CFFP, itself preserves Section 209(a)'s preemption of fleet purchasing requirements. Pet Br. 42-43. Section 246, to be sure, bears some similarity to SCAQMD's actions by requiring States to submit a State implementation plan (SIP) revision establishing a clean-fuel vehicle program if the State is classified as a "covered area" as defined in the section. 42 U.S.C. § 7586. However, Congress did not prohibit a State from using a similar program, on its own initiative, to address air quality problems, nor did it prohibit States from adopting even more stringent provisions. Congress understood that these provisions were not the exclusive realm for addressing and promoting alternative fueled vehicles and that States could choose to implement a similar program even when not required to do so by Section 246.[10] Moreover, Congress has

[9] To the extent that the views of the United States differ with these arguments, the positions presented in its *amicus* brief are litigating positions that have not met the prerequisites for deference to statutory interpretation. See *Geier* v. *American Honda Motor Co., Inc.*, 529 U.S. 861, 911 (2000) (Stevens, J., dissenting) (citing *Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000)).

[10] A similar situation exists with regard to incentive programs. Section 249(f)(2) permits States to revise their SIP to provide incentives for the sale or use of clean-fuel vehicles that are produced, sold, and distributed in California. Many States already have incentive programs (financial incentives to purchasers of clean-fuel vehicles, exemptions from high occupancy vehicle requirements, and parking preferences) that Section

authorized other federal actions to secure fleet-based pollution reductions. See, *e.g.*, Energy Policy Act of 1992, 42 U.S.C. § 13201 *et seq.* (requiring fuel providers and state governments to acquire a certain percentage of alternative fueled vehicles and requiring the Department of Energy to evaluate promulgating rules for private and municipal fleets to acquire a certain percentage of alternative fueled vehicles). Therefore, Section 246 signifies nothing more than Congress' recognition that a clean-fuel fleet program is an effective tool to improve air quality in an area.[11]

3. Narrow Congressional Concern About a "Third Car" Is Not Implicated by South Coast's Action

Congress' limited purpose in preempting one aspect of motor vehicle regulation should inform the Court's evaluation of these provisions. The District Court below thoroughly reviewed this history. Pet. App. 10a-13a. It shows that Congress recognized that California had special air quality needs justifying a new motor vehicle emissions program

249 lists as permissible. 42 U.S.C. § 7489(f)(3); pp. 14-15, *supra*. If Petitioner and *Amici's* analysis is adopted, such incentive programs used by States independent of the Federal incentive programs would be preempted.

[11] The United States, as *amicus*, argues that Section 249, which establishes the California pilot test program for light-duty trucks and light-duty vehicles, signals that programs like the Fleet Rules are preempted. U.S. Br. 27. However, the California pilot test program is a narrow program that requires automobile manufacturers to produce and sell a certain number of vehicles to the California public. 42 U.S.C. § 7589; see *American Auto. Mfrs. Ass'n v. Cahill*, 973 F. Supp. 288, 300 n.11 (N.D.N.Y. 1997). The provision does not speak to whether a requirement that operators of light-duty and heavy-duty fleets purchase certain low emission vehicles is preempted. Moreover, the Second Circuit has found the preemption reference to "standards" in Section 209 did not extend to the separate authority for Clean Fleets plans. *MVMA*, 17 F.3d at 532.

stricter than the federal program and that the State should be afforded the broadest discretion possible in selecting the best means to protect the health of its citizens. See H.R. Rep. No. 90-728 (1967).[12] Additionally, Congress appreciated that California was a pioneer in setting emissions standards and could continue to serve as a laboratory for further controls. *Engine Mfrs. Ass'n* v. *EPA*, 88 F.3d 1075, 1079-80 (D.C. Cir. 1996); *MEMA*, 627 F.2d at 1110-11 (citing S. Rep. No. 90-403, at 33 (1967)). Indeed, California has been involved in these efforts since 1946 and first developed comprehensive standards in 1957. *MEMA*, 627 F.2d at 1107, 1109 n.26. California's severe air quality challenges continue to this day, with it consistently rated among the areas with the worst ozone problems in the Nation. JA 80.

Congress sought only to avoid the potential confusion and burden that would be created by the requirement that manufacturers or drivers going into new States abide by standards for a "third car" other than the California or federal approaches. David P. Currie, *Motor Vehicle Air Pollution: State Authority and Federal Pre-Emption*, 68 Mich. L. Rev. 1083, 1090-91 (1969-70). The scope of this preemption is limited and was designed to protect against that one purpose—to ensure auto manufacturers would not potentially have to create 50 different classes of cars to meet each State's different emissions control standard. Congress wanted to avoid placing an "undue burden on the automobile manufacturing industry." *MVMA*, 17 F.3d at 527; see also Pet. App. 26a; H.R. Rep. No. 90-728, at 21 (1967) (preemption is "necessary in order to prevent a chaotic situation from developing in interstate commerce in new motor vehicles"); Jan Stevens, *Air Pollution and the Federal System: Responses to Felt Necessities*, 22 Hastings L. J. 661, 674 (1970-71). At

[12] See also Ashley Morris Bale, *The Newest Frontier in Motor Vehicle Emission Control: The Clean Fuel Vehicle*, 15 Va. Envtl. L. J. 213, 224-25 (1995-96).

the same time, Congress sought to strike a balance between the need for a national standard, the unique situation in California, and the needs of areas around the nation to come into attainment with public health air quality standards.

EPA has long recognized—at least until the filing of the United States' brief here—Congress' narrow purpose with respect to preemption of engine regulation. In commenting upon a parallel preemption provision for aircraft engines, Section 233, 42 U.S.C. § 7573, EPA opined by letter that, if a court reviewing a state regulation were to find "no necessary impairment of the operator's ability to operate and test the engine, it [would] seem[] quite likely that [the court] would find the state action not to contravene the Congressional purpose of barring varying state and local regulations which dictate how engines are designed, built and operated." *People of State of California* v. *Dep't of the Navy*, 624 F.2d 885, 888 (9th Cir. 1980), *aff'g* 431 F. Supp. 1271, 1286-87 (N.D. Cal. 1977). The Ninth Circuit in *Dep't of the Navy* affirmed a District Court finding that state regulations affecting emissions from engine test cell housings had "absolutely no effect upon the design, manufacture, and/or operation of aircraft engines," and therefore were not preempted by the Clean Air Act. *Dep't of the* Navy, 431 F. Supp. at 1287.

Similarly, the Fleet Rules do not run afoul of Congressional intent by creating a third vehicle. Rather, they are consistent with the deference Congress provided to California to develop its own strategy for reducing its air pollution and the tools reserved to the States more generally to develop attainment strategies. This Court should be equally reluctant to find that a particular strategy by California exceeds the scope of the State's authority. A measure should only be

found to be preempted if it clearly falls within the scope of Congress's intent to preempt state authority.[13] *Rice*, 331 U.S. at 230.

The effort by petitioners and their *amici* to preclude any "attempt to 'reduce harmful emissions from certain motor vehicle fleets'" goes too far. Brief for The Chamber of Commerce of the United States of America as *Amicus* at 12. See also Pet. Br. 28 ("even when a state law lacks this express reference to emission characteristics . . . , it may nonetheless be preempted if it is linked in some other manner to control of motor vehicle emissions . . . ."). Congress' purpose was to equip States with the tools to meet their air quality obligations while affording predictability to manufacturers. Nowhere is there evidence that Congress intended to completely hamstring state efforts at addressing emissions. Congress was very aware of the distinction it was creating between "standards" and other practices such as use and maintenance and its impact even on the unique problems of the Los Angeles region. See *Hearings on Automotive Air Pollution before the Subcomm. On Air and Water Pollution of the Senate Comm. on Public Works*, 90th Cong., 1st Sess. 115 (1967) (statement of Sen. Baker) ("You don't think the doctrine of Federal preemption would prevent the State of

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[13] Petitioners' invocation of the "third car" prohibition, Pet. Br. 31, is somewhat mystifying, in view of the record below, which indicates that three out of the four major engine manufacturers are already making several different engine models that qualify for purchase under South Coast's Fleet Rules. See JA 221-34. There are currently more than 50 commercially available makes and models of NGVs. See The Natural Gas Vehicle Coalition, *2002 Natural Gas Vehicle Coalition Purchasing Guide, available at* http://www.afdc.doe.gov/pdfs/ngv_guide02.pdf. While *Amici* American Road & Transportation Builders Ass'n et al. identify a number of features of the Fleet Rules that prohibit so heavy a reliance on diesel vehicles for fleets, Br. 24-25, none of these constitute a preference or mandate for an otherwise non-certified vehicle.

California or Los Angeles County from making additional restrictive regulations on the use or the maintenance of vehicles?").

4. The Act Permits State and Local Governments to Impose Reasonable Restrictions on Commercial Fleet Activity as an Attainment Strategy

The Clean Air Act's plain language, structure, and purpose all support the retention of authority by SCAQMD to impose reasonable requirements on commercial and municipal fleets as vital parts of an attainment strategy for achieving public health air standards. In a strikingly similar case, the Southern District of New York evaluated emissions-related restrictions on licensed taxi cabs imposed by the New York City Taxi and Limousine Commission. That court explained that:

> both the history and text of the Act show that the . . . preemption section was made not to hamstring localities in their fight against air pollution but to prevent the burden on interstate commerce which would result if, instead of uniform standards, every state and locality were left free to impose different standards for exhaust emission control devices for the manufacture and sale of new cars.

Allway Taxi, Inc. v. *City of New York*, 340 F. Supp. 1120, 1124 (S.D.N.Y.), *aff'd.*, 468 F.2d 624 (2d. Cir. 1972). That Court further reasoned that the Clean Air Act does not "preclude a locality from setting its own standards for the licensing of vehicles for commercial use within that locality." *Id.* The "burden of compliance" with such standards is "on individual owners and not on manufacturers and distributors." *Id.*

This same analysis pertains to the Fleet Rules here. As the District Court explained, "[t]he Fleet Rules accept as a given the existing CARB vehicle standards; they merely require fleet operators to choose from among the least polluting of

CARB-certified, available vehicles. The Rules impose no new emission requirement on manufacturers whatsoever. . . ." Pet. App. 21a.

The fleet rules adopted by the SCAQMD are not standards relating to the control of emissions and therefore are a valid exercise of the State's police power.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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